No. 09-768

Supreme Court, U.S.
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In The

Supreme Court of the United States

ROBERT D. STRALEY,

Petitioner,

v.

UTAH STATE BOARD OF PARDONS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Does the Separation of Powers Provision of the United States Constitution apply to the states?

2. Does Utah's statutory parole scheme, which gives the Utah parole board broad discretion to determine parole within an indefinite sentencing system, create a federally-protected liberty interest?

Respondents Utah Board of Pardons and Warden Clint Friel submit this brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in *Straley v. Board of Pardons*, 582 F.3d 1208 (10th Cir. 2009).

REASONS FOR DENYING THE PETITION

I. There Is No Compelling Reason To Grant This Petition For A Writ Of Certiorari

While claiming that the United States Court of Appeals for the Tenth Circuit erred in its decision, petitioner has not put forth any compelling reason why this Court should grant his petition. Sup. Ct. R. 10. He has neither claimed nor shown that there is a conflict between the challenged decision of the Tenth Circuit and that of any other United States court of appeals. Petitioner has not claimed that an important federal question was decided in a manner that conflicts with the decision of any other United States court of appeals or a state court of last resort. Nor has petitioner shown that the lower court's decision "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

Instead, petitioner simply claims that the Tenth Circuit's decision was wrong in two particulars. This petition for a writ of certiorari should be denied

because it fails to raise any question worthy of review by this Court.

II. The Separation Of Powers Provision Of The United States Constitution Does Not Apply To The States

Petitioner admits that the United States Court of Appeals for the Tenth Circuit rejected his separation of powers argument "because the United States Constitution's separation of powers were inapplicable to a state's organization of its own government." Petition for a Writ of Certiorari at 3. But, in seeking review before this Court, the petitioner fails to address the actual ruling of the lower court. Instead, he repeats his argument that Utah's Board of Pardons is performing a judicial function in setting parole dates. He does not address the actual issue decided, i.e., that the federal separation of powers doctrine does not apply to Utah.

In *Sweezy v. State of New Hampshire*, 354 U.S. 234, 255 (1957), this Court explained that "the concept of separation of powers embodied in the United States Constitution is not mandatory in state governments." In reaching that conclusion, this Court relied, in part, on its prior decision in *Dreyer v. People of State of Illinois*, 187 U.S. 71 (1902).

> Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to

> one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state.

Id. at 84.

The United States Constitution guarantees each state a republican form of government. U.S. Const. art. IV, § 4. It does not require of the states that their governments comply with the federal concept of separation of powers. The Utah Supreme Court has held that the powers of the Utah Board of Pardons do not violate the separation of powers provision of Utah's Constitution. *Padilla v. Utah Bd. of Pardons and Parole*, 947 P.2d 664, 668-69 (Utah 1997). This is a question of state law and does not raise an important federal question that should be addressed by this Court.

III. No Federal Liberty Interest Is Created In Parole Under Utah Law

Petitioner claims that he had a liberty interest in being granted parole. Petition for a Writ of Certiorari at 7. In making this claim he does not cite to any federal precedent establishing such a right, but infers it from the limited right to procedural due process that is found under Utah law. *Padilla*, 947 P.2d at 666.[1] But petitioner has failed to explain how the

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[1] "[T]wo due process requirements must be met in parole grant hearings. First, an inmate must receive adequate notice to

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lower court erred in finding that no federal liberty interest had been created.

Utah's parole board is given very broad discretion in making parole decisions. But a federal liberty interest is only created when state law sufficiently limits the discretion of a parole board. *Bd. of Pardons v. Allen*, 482 U.S. 369, 381 (1987). Where such a board has broad discretion in making its decisions, no federal liberty interest is created. *Jago v. Van Curen*, 454 U.S. 14, 20-21 (1981).

Nor does a state-created right to procedural due process create a federal liberty interest. In *Olim v. Wakinekona*, 461 U.S. 238, 250-51 (1983), this Court held that a state's requirement that certain procedures be followed in making a discretionary decision did not create a liberty interest where no substantial restrictions are placed on the discretion to be exercised. No federal liberty interest has been created by Utah's parole system.

Petitioner also errs in claiming that Utah courts will not enforce the state constitutional right to limited procedural due process in parole hearings. In *Preece v. House*, 886 P.2d 508, 512 (Utah 1994), the Utah Supreme Court expressly ordered that a new

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prepare for a parole hearing Second, an inmate must receive copies or a summary of the information in the Board's file upon which the Board will rely in deciding whether to grant parole" *Peterson v Utah Bd of Pardons*, 931 P2d 147, 150 (Utah App 1997) (citations omitted)

parole hearing be granted because an inmate's state procedural right had been violated. Further, the Utah Supreme Court reviews other claims of error on the part of the parole board under an arbitrary and capricious standard, where a showing of sufficiently unusual circumstances would constitute grounds for overturning the board's decisions. *Padilla*, 947 P.2d at 671.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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